IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL ANTHONY ADDUCI, SR., Appellant.	)	2 CA-CR 2006-0231 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053210

Honorable Howard Hantman, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 Following a jury trial, appellant Michael Adducci, Sr., was convicted of manslaughter, child abuse, endangerment, driving under the influence of intoxicating liquor (DUI), and driving under the extreme influence of intoxicating liquor (extreme DUI) with a blood alcohol concentration (BAC) of .15 or more. The trial court sentenced him to time served on both DUI charges and to presumptive, concurrent prison terms for the manslaughter, child abuse, and endangerment charges, the longest of which was 10.5 years. On appeal, Adducci argues the trial court abused its discretion in admitting evidence of a prior DUI conviction to prove his mental state at the time of these offenses because his defense was that he was not driving the vehicle at the time of the accident and he did not dispute that the driver's conduct was reckless.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On April 9, 2005, Michael Adducci, Sr., and his son, Michael (Michael Jr.), attended a party at the home of Alan Archer, where Adducci and Archer's son James consumed alcohol. At approximately 12:15 a.m., Adducci, James, and Michael Jr. left the party in a Toyota Land Cruiser. Adducci was driving, James was in the front passenger seat, and Michael Jr. rode in the back area without a seat or seatbelt.

¶3 At approximately 1:00 a.m., Pima County Sheriff's Deputy Ryan Powell was dispatched to a rollover accident. When he arrived, emergency medical and fire personnel

were already at the scene. James was lying on the east side of the road and apparently had been pronounced dead. Four to five paramedics were working on Adducci, who was also lying on the ground. Powell noticed a "very strong" odor of alcohol when he approached Adducci. Michael Jr., although injured, was able to speak with police officers at the scene. He told Powell his father had been driving at the time of the accident. He later repeated this in a tape-recorded statement to Deputy Gardner.

¶4 At the hospital, in the presence of Deputy Eric Heath, Adducci told medical staff he had been the one driving the vehicle and he had been drinking. Hospital personnel drew blood from Adducci three separate times. Analysis of those samples showed that Adducci's BAC one hour after the accident was approximately 0.193. Approximately eleven days later, Adducci also told Alan Archer that he had been driving the vehicle at the time of the accident.

¶5 Adducci was charged with manslaughter, theft of a means of transportation, criminal damage, child abuse, endangerment, DUI, extreme DUI with a BAC of 0.15 or more, and, as a lesser-included offense, driving with a BAC of 0.08 or more.[1] The state filed a pretrial motion pursuant to Rule 404(b), Ariz. R. Evid., to introduce evidence of Adducci's two prior DUI convictions in 1996 and 1999. The state argued the convictions "[bore] directly on the critical issue of whether the Defendant 'was aware of and consciously

[1]The theft of a means of transportation and criminal damage charges were severed from this case prior to trial.

disregarded a substantial and unjustifiable risk' that driving under the influence of alcohol could cause the death of another human being." The trial court admitted evidence of Adducci's 1999 DUI conviction but not his 1996 conviction. The jury found Adducci guilty on the five charges noted above. We have jurisdiction of this appeal pursuant to A.R.S. § 13-4033(A).

Discussion

¶6 As he did below, Adducci argues that the court erred in admitting evidence of his 1999 DUI conviction because Rule 404(b), Ariz. R. Evid., does not apply. He contends that, because his defense at trial was that he was not driving the vehicle when the accident occurred, the prior conviction was unnecessary to prove intent, and its admission was more prejudicial than probative. The state contends admitting the prior conviction was proper under Rule 404(b) because "the State was required to prove recklessness as an essential element" of both offenses. *See* A.R.S. §§ 13-1103 (manslaughter) and 13-1201 (endangerment). We review a trial court's admission of other-act evidence under Rule 404(b) for an abuse of discretion. *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

¶7 Rule 404(b) provides as follows:

> Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In addition to Rule 404(b), which "requires that the evidence be admitted for a proper purpose, Rule 402 requires that the evidence be relevant, Rule 403 requires that the danger of unfair prejudice not outweigh probative value, and Rule 105 requires that the judge give an appropriate limiting instruction upon request." *State v. Nordstrom*, 200 Ariz. 229, ¶ 54, 25 P.3d 717, 736 (2001).

¶8 In granting the state's motion to admit evidence of Adducci's 1999 DUI conviction, the trial court relied on *State v. Woody*, 173 Ariz. 561, 845 P.2d 487 (App. 1992), which involved facts similar to those present here. The defendant in *Woody* was driving the wrong way on a road and struck another vehicle, killing the other driver. *Id.* at 562, 845 P.2d at 488. His BAC at the time of the accident was estimated to have been 0.2142. *Id*. The defendant was charged with manslaughter, and at trial the state sought to introduce evidence of his nine previous arrests for DUI to prove recklessness on the manslaughter charge. *Id*. The trial court permitted only the most recent conviction to be admitted at trial. *Id*. On appeal, this court affirmed, concluding the facts of the defendant's prior conviction were similar enough that the jury could properly infer that, "as a result of [the prior conviction], appellant was made aware of the risks he posed to others in driving while under the influence." *Id*. at 563, 845 P.2d at 489.

¶9 We agree with the state that *Woody* generally permits the introduction of a prior DUI conviction to prove recklessness in a subsequent trial for manslaughter resulting from a DUI. However, in *Woody*, there was no dispute about the driver's identity because

he was arrested after a traffic stop during which the police officer observed the defendant "'roll[]' out of the car." *Id*. at 562, 845 P.2d at 488. Thus, *Woody* did not address or resolve the specific question presented here: whether admission of a prior conviction is appropriate when the defendant does not contest the issue of recklessness and denies driving the vehicle at all.

¶10 Four years after *Woody* was decided, our supreme court decided *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). In *Ives*, the defendant had been charged with four counts of child molestation. 187 Ariz. at 103, 927 P.2d at 763. The trial court denied Ives's motion to sever because it found the four offenses, which involved different victims, were part of a common scheme or plan. *Id*. at 108, 927 P.2d at 768. The court of appeals affirmed. *Id*. at 105, 927 P.2d at 765. On review, the supreme court held the alleged incidents were not part of a common scheme or plan and the defendant's motion to sever should have been granted. *Id*. at 109, 927 P.2d at 769.

¶11 The court went on to assess whether the error was harmless, which it evaluated by determining whether, had the offenses been tried separately, the cumulative evidence of the other offenses could have been admitted at each of the trials under Rule 404(b). *Id*. The state argued the other offenses were admissible "'to show intent and lack of mistake or accident.'" *Id*. The court examined the state's purported purpose for the evidence in light of the defendant's denial that he had ever touched any of the victims in a sexual manner. *Id*. And it noted other jurisdictions were split on "whether a defendant may remove intent

as an issue by a blanket denial of participation in a criminal act." *Id.* Quoting *United States v. Mazzanti*, 888 F.2d 1165, 1171 (7th Cir. 1989), the court noted the Seventh Circuit has held that, "'[i]n cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made it an issue in the case[,]'" and concluded that introducing evidence of other acts on the issue of intent was permissible. *Ives*, 187 Ariz. at 109, 927 P.2d at 769. But the court further noted the Second Circuit "has taken a different approach," permitting a defendant "'to take the [intent issue] out of a case'" by making it sufficiently clear that the issue will not be contested. *Id*. at 109-10, 927 P.2d at 769-70, *quoting United States v. Colon*, 880 F.2d 650, 657 (2d Cir. 1989).

¶12 Ultimately the court concluded in *Ives*:

> We prefer the approach in *Colon* to that in *Mazzanti*. Otherwise, the general rule prohibiting introduction of prior bad acts to show character would never apply to specific intent crimes because intent would always be at issue. This, we believe, cuts too deeply into the rule against character evidence. Moreover, it does so based on a nearly meaningless distinction. As the instant case amply demonstrates, sometimes even specific intent crimes do not put intent at issue. Even a cursory reading of the record below indicates that the issue in this case was whether the defendant committed the acts at all, not what his state of mind was when he committed them.
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> We do not believe that in a case such as this, absent another legitimate 404(b) purpose, prior bad acts demonstrate anything beyond an improper character inference. If intent is not at issue, and no other valid 404(b) grounds exist, we fail to see why propensity evidence is permissible in specific intent cases but not those involving general intent crimes.

Id. at 110, 927 P.2d at 770. Furthermore, the court stated that a formal offer to stipulate to intent was not required "where [the] defendant steadfastly maintains that he simply did not commit any of the criminal acts in question [because] there is no issue as to intent and no danger of shifting defense theories to justify the admission of the prior bad acts." *Id*. at 110-11, 927 P.2d at 770-71.

¶13 The state attempts to distinguish *Ives* and *State v. Torres*, 162 Ariz. 70, 781 P.2d 47 (App. 1989), the other case on which Adducci relies, by arguing the other-act evidence in those cases was not offered to establish a fundamental element of the state's case. We disagree. To prove molestation in *Ives*, the state was required to prove the defendant had "intentionally or knowingly" engaged in sexual contact with a child under fifteen years of age. *See* A.R.S. § 13-1410. Thus, state of mind was an essential element of the offense, and at trial the state argued the prior acts were admissible to prove the defendant's intent. 187 Ariz. at 109, 927 P.2d at 769. Similarly, in *Torres*, the state sought to introduce evidence of the defendant's prior heroin use in his trial for possession of heroin.[2] 162 Ariz. at 71, 72, 781 P.2d at 48, 49. The trial court admitted the evidence,

[2]In *Torres*, the defendant had been observed in the car of a known drug dealer. Police officers saw him hand the driver money and saw the driver hand him a small package. 162 Ariz. at 72, 781 P.2d at 49. When he saw the approaching officers, Torres got out of the car and ran. *Id*. As he was running away, he made a throwing motion with his hand, and the officers discovered a package of heroin in that vicinity. *Id*. After being arrested, Torres admitted having used heroin in the past. *Id*. At trial, his defense was that the heroin was not his, he did not throw it, and the officers had planted it. *Id*. Over his objection the court admitted his statement about his prior heroin use. *Id*. On appeal, he argued the statement was inadmissible under Rule 404(b). Division One agreed, finding that, based on the

finding it "relevant to show the defendant 'knew what he was dealing.'" *Id*. Therefore, because possession required knowledge, the evidence in *Torres* was also offered to establish a fundamental element of the state's case.

¶14 In both *Ives* and *Torres*, as in the present case, the state attempted to introduce evidence that was arguably relevant to the state-of-mind element of each offense. However, despite its logical relevance, the evidence in *Ives* and *Torres* was held inadmissible under Rule 404(b) because the issue to which the proffered evidence related was not disputed by virtue of the defendant's chosen defense in each case. Similarly, here, Adducci's defense was that he was not driving the vehicle when the accident occurred. Thus, the actual driver's recklessness was not a contested issue. We find *Ives* and *Torres* indistinguishable from this case. *See also State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997) ("Where . . . the accused denies any involvement in the charged offense, the 'intent' exception of 404(b) is not a proper basis for injecting prior misconduct into a proceeding.").

¶15 The state also argues the prior conviction was admissible because Adducci did not offer to stipulate or "forego the right to put the state to its burden of proving *all elements of the offense*, including recklessness." However, as we have noted, *Ives* explicitly held that a stipulation is not required when the defendant wholly denies having committed the

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defendant's theory of defense, none of the exceptions in Rule 404(b) applied, and the evidence served no purpose except as inadmissible propensity evidence. *Id*. at 73, 781 P.2d at 50.

offense. Moreover, our conclusion that *Ives* precludes the admission of a prior conviction to prove a defendant's state of mind when state of mind is not a contested issue does not alter the state's burden of proving that element. It simply means the state must prove state of mind with other evidence that is less inherently prejudicial. *See Ives*, 187 Ariz. at 111, 927 P.2d at 771 (requiring Rule 403, Ariz. R. Evid., analysis in Rule 404(b) considerations). Therefore, the trial court abused its discretion in admitting proof of Adducci's prior conviction to prove his state of mind in the current offense.

¶16 Although we have concluded it was error for the trial court to admit Adducci's prior conviction under Rule 404(b), we need not reverse the conviction if the error was harmless. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Error is harmless if we can say, beyond a reasonable doubt, that it did not contribute to the verdict. *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). "[I]f . . . the verdict would have been the same without the inadmissible evidence, the erroneously admitted evidence cannot be said to have contributed to the verdict." *State v. Eggers*, 215 Ariz. 472, ¶ 49, 160 P.3d 1230, 1246 (App. 2007); *see also State v. Davolt*, 207 Ariz. 191, ¶ 43, 84 P.3d 456, 470 (2004). Thus, we look at the impact of the inadmissible evidence "'in light of the totality of properly admitted evidence.'" *Eggers*, 215 Ariz. 472, ¶ 49, 160 P.3d at 1246, *quoting State v. Fulminante*, 193 Ariz. 485, ¶ 50, 975 P.2d 75, 90 (1999).

¶17 Aside from the evidence of Adducci's prior conviction, the jury heard evidence about the nature of the accident and that Adducci's BAC one hour after the accident was

more than twice the legal limit. Although Adducci and Michael Jr. testified at trial that Adducci had not been driving when the accident happened, the jury also heard considerable contradictory evidence that: Michael Jr. had told two police detectives at the scene that his father was driving; Adducci had told medical personnel he had been drinking and driving; and more than a week after the accident, Adducci had told Alan Archer that he had been driving at the time of the accident.

¶18 Although the trial court erred by admitting the prior conviction, the court explicitly instructed the jury on the limited purpose for which it could consider the prior conviction, and counsel underscored the point during closing argument. Given the overwhelming evidence presented against Adducci and the limiting jury instruction, we can say beyond a reasonable doubt that the verdict would have been the same had his prior conviction not been admitted. *See State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (prosecutor's statement improper but harmless given context in which it was made and overwhelming evidence of guilt); *State v. Clow*, 130 Ariz. 125, 127, 634 P.2d 576, 578 (1981) (court's admonition that jurors disregard witness comment sufficient to cure prejudice unless comment highly damaging or instruction clearly inadequate); *see also State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996) (jury presumed to follow instructions). Thus, the error was harmless. *See State v. Mills*, 196 Ariz. 269, ¶ 28, 995 P.2d 705, 711-12 (App. 1999) (for reversal, defendant must show reasonable probability of acquittal had evidence not been admitted).

Disposition

¶19 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge